ROGERS JOSEPH O'DONNELL
RENÉE D. WASSERMAN (State Bar No. 108118)
ALEXIS JANSSEN MORRIS (State Bar No. 200264)
311 California Street, 10th Floor
San Francisco, California 94104
Telephone: 415.956.2828
Facsimile: 415.956.6457
E-mail address: rwasserman@rjo.com

THE LUSTIGMAN FIRM, P.C.
SHELDON S. LUSTIGMAN (admitted *pro hac vice*)
ANDREW B. LUSTIGMAN (admitted *pro hac vice*)
149 Madison Avenue, Suite 805
New York, New York 10016
Telephone: 212.683.9180
Facsimile: 212.683.9181
E-mail address: andy@lustigmanfirm.com

Attorneys for Defendants
MEDLAB, INC., PINNACLE HOLDINGS, INC., METABOLIC RESEARCH ASSOCIATES, INC., U.S.A. HEALTH, INC. and L. SCOTT HOLMES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, vs. MEDLAB, INC., et al., Defendants.	Case No. CV-08-0822-SI AFFIDAVIT OF ANDREW B. LUSTIGMAN DATE: July 18, 2008 TIME:9 am CTRM:10, 19th Floor

I, Andrew B. Lustigman, declare and state:

I am an attorney with The Lustigman Firm, P.C., attorneys for defendants, Inc. in the within action. I submit this declaration in support of Defendants' Opposition to the FTC's Motion to Strike.

1. Attached hereto as Exhibit 1 is a true and correct copy of a cover sheet and portion, including requests Numbers 1 and 3, of Plaintiff's First Request for Admissions from Defendants.

2. Attached hereto as Exhibit 2 is a true and correct copy of a cover sheet and portion, including requests Numbers 24, 25 and 26, of Plaintiff's First Request for Production of Documents.

3. Attached hereto as Exhibit 3 is a true and correct copy of the November 10, 3003 Order Denying in Part and Granting in Part Plaintiff Federal Trade Commission's Motion to Strike Various Affirmative Defenses of Defendants A. Glen Braswell, et al. in the case *Federal Trade Commission v. A. Glen Braswell et al.*, No. 03-3700DT (C.D. Cal.).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of June, 2008 at New York, NY.

Andrew B. Lustigman

WILLIAM BLUMENTHAL
General Counsel

Kerry O'Brien (Cal. Bar No. 149264)
Sarah Schroeder (Cal. Bar No. 221528)
Evan Rose (Cal. Bar No. 253478)
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415) 848-5100
Fax: (415) 848-5184
E-mail addresses: kobrien@ftc.gov
sschroeder@ftc.gov
erose@ftc.gov

Attorneys for Plaintiff
Federal Trade Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

FEDERAL TRADE COMMISSION, Plaintiff, v. MEDLAB, INC., PINNACLE HOLDINGS, INC., METABOLIC RESEARCH ASSOCIATES, INC., U.S.A. HEALTH, INC., and L. SCOTT HOLMES, individually and as an officer of Medlab, Inc.; Pinnacle Holdings, Inc.; Metabolic Research Associates, Inc.; and U.S.A. Health, Inc., Defendants.	No. C-08-00822 SI **PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS FROM DEFENDANTS**

the Respondent shall specify those portions of the Request which are admitted and qualify or deny the remainder.

10. If the Respondent lacks the information or knowledge with which to admit or deny a Request, the Respondent must conduct a reasonable inquiry to attempt to obtain the information or knowledge needed to make an admission or denial.

11. Unless otherwise specified, the relevant time period for each admission is January 1, 2005, to the present.

REQUESTS FOR ADMISSIONS

Admit that:

Corporate Defendants

1. Since at least 1998 and continuing until approximately January 2007, Medlab manufactured, advertised, promoted, offered for sale, sold, and distributed Zyladex to consumers throughout the United States.
2. Medlab has sold Zyladex to consumers who reside in the Northern District of California.
3. Since at least 1999 and continuing until approximately January 2007, MRA has manufactured, advertised, promoted, offered for sale, sold, and distributed Questral to consumers throughout the United States.
4. MRA has sold Questral to consumers who reside in the Northern District of California.
5. Since at least 2000 and continuing until approximately January 2007, USA Health has manufactured, advertised, promoted, offered for sale, sold, and distributed Rapid Loss to consumers throughout the United States.
6. On behalf of Medlab, MRA and USA Health, Pinnacle placed advertisements for Zyladex, Questral, and Rapid Loss in Sunday newspaper supplements.

WILLIAM BLUMENTHAL
General Counsel

Kerry O'Brien (Cal. Bar No. 149264)
Sarah Schroeder (Cal. Bar No. 221528)
Evan Rose (Cal. Bar No. 253478)
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415) 848-5100
Fax: (415) 848-5184
E-mail addresses: kobrien@ftc.gov
sschroeder@ftc.gov
erose@ftc.gov

Attorneys for Plaintiff
Federal Trade Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MEDLAB, INC.,

PINNACLE HOLDINGS, INC.,

METABOLIC RESEARCH ASSOCIATES, INC.,

U.S.A. HEALTH, INC., and

L. SCOTT HOLMES,
individually and as an officer of Medlab, Inc.; Pinnacle Holdings, Inc.; Metabolic Research Associates, Inc.; and U.S.A. Health, Inc.,

Defendants.

No. C-08-00822 SI

PLAINTIFF'S FIRST REQUEST FOR DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS

c. The Weight-Loss Products cause users to lose as much as 50% of all excess weight in just 14 days, without dieting or exercising.

d. The Weight-Loss Products cause permanent or long-term weight loss.

e. Clinical studies prove that the Weight-Loss Products cause users to lose substantial amounts of weight rapidly, without dieting or exercising.

21. All documents and electronically stored information that tend to call into question or disprove the claims listed in Specifications 19 and 20.

22. All documents and electronically stored information relating to the efficacy of the Weight-Loss Products, as formulated during the Period of Inquiry.

23. All documents and electronically stored information relating to any of the materials provided in response to Specification 19 or 20, including, but not limited to, any document or information that disputes, contradicts, or calls into question any of the information in any of the documents and information submitted in response to Specifications 19 or 20.

24. Documents sufficient to identify each Person who, since 1996, has tested the chemical composition or efficacy of the Weight-Loss Products for any purpose, or with whom Defendants have corresponded regarding any proposed or prospective test of the chemical composition or efficacy of the Weight-Loss Products for any purpose.

25. Documents sufficient to identify each in-house or outside psychological, scientific, nutritional, medical, or other consultant that any Defendant has employed regarding the Weight-Loss Products since 1996.

26. All documents and electronically stored information relating to any research study, or any proposed research study, of the Weight-Loss Products since 1996.

27. All documents and electronically stored information relating to the creation of the Weight-Loss Products.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

A. GLENN BRASWELL, JOL MANAGEMENT CO., G.B. DATA SYSTEMS, INC., GERO VITA INTERNATIONAL, INC., THERACEUTICALS, INC., AND RON TEPPER

Defendants.

CASE NO. CV 03-3700DT (PJWx)

ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION TO STRIKE VARIOUS AFFIRMATIVE DEFENSES OF DEFENDANTS A. GLENN BRASWELL, JOL MANAGEMENT CO., G.B. DATA SYSTEMS, INC., THERACEUTICALS, INC.

I. Background

A. Factual Summary

This action is brought by Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), which is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The Commission brings this action against Defendants A. Glenn Braswell, ("Braswell"), JOL Management Co., ("JOL"), G.B. Data Systems, Inc., Gero Vita International, Inc., ("GVI"),

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Theraceuticals, Inc., ("Theraceuticals"), and Ron Tepper ("Tepper") - all of which are hereinafter collectively referred to as the "Braswell Common Enterprise."

The Commission brings this action under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), to secure a permanent injunction, restitution, disgorgement, and other equitable relief against the Braswell Common Enterprise for engaging in deceptive acts or practices and false advertising in connection with the advertising, marketing, and sale of products purporting to treat, prevent, and or cure such conditions as respiratory illnesses, diabetes, dementia, obesity, and impotence, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint for Permanent Injunction and Other Equitable Relief (hereinafter "Complaint") at 1-2.

The Commission alleges the following facts in its Complaint:

For over twenty-five years, Braswell has marketed dietary supplements and other health-related products through a frequently changing group of interrelated companies. See Complaint at ¶ 5. Defendants Braswell, JOL, G.B. Data Systems, GVI, Theraceuticals, and Tepper operate a common business enterprise. Id. at ¶ 11. They share and have shared officers, employees, and office locations; have commingled funds; and are commonly controlled and have participated in a common scheme to engage in deceptive acts and practices, making them jointly and severally liable for said acts and practices. Id.

The Braswell Common Enterprise is one of the largest direct marketers of dietary supplements and other health-related products in the United States, with total sales since 1998 exceeding $798 million. See Complaint at ¶ 13. The Braswell Common Enterprise uses direct mail solicitations to generate business. See Complaint at ¶ 14. It purchases or rents consumer names and

addresses from brokers, targeting persons aged 40 to 60, and mails advertising to these consumers. Id.

New and repeat purchasers receive multi-page advertisements that describe various medical conditions and detail various remedies - often purportedly based on "scientific breakthroughs" or "long lost but newly discovered" formulas. Id. Defendants claim that their products will cure, treat, or alleviate these conditions in glossy, multi-page brochures that typically feature "expert" medical or scientific endorsers, consumer testimonials, and frequent references to "scientific" evidence that purport to substantiate the efficacy and benefits of the products. Id.

Purchasers also receive a "subscription" to the *Journal of Longevity*, which appears to be a legitimate medical journal with scientific articles written by medical professionals but which is, in fact, promotional advertising prepared and disseminated by Defendants. Id. Consumers can purchase the advertised products via mail order, telephone, or electronically on Defendants' website, www.gvi.com. Id.

Defendants' advertisements contain a return address in Toronto, Canada, to which consumers send their orders via mail. See Complaint at ¶ 15. In fact, Defendants have no employees in Canada and all such mail orders are sent from the Canadian mail drop address to Defendants' offices in the United States for fulfillment. Id.

Among the products that Defendants have advertised, labeled, offered for sale, sold and distributed in recent years are: Lung Support Formula, Gero Vita G.H.3, and Testerex, all marketed since at least 1998; ChitoPlex, marketed since at least 1999; AntiBetic Pancreas Tonic, marketed since at least 2000; and Theraceuticals GH3 Romanian Youth Formula, marketed since at least 2001. See

Complaint at ¶ 16. Like their other products, Defendants advertise and offer these products for sale through direct mail advertising, including the *Journal of Longevity*, and through their website, www.giv.com. Id.

In its Complaint, the Commission details the specific claims made for each product, indicating the symptoms that each product cures or alleviates, and includes testimonials from consumers indicating their endorsement for the products. See generally, Complaint at 6-31.

Defendants have represented, either expressly or by implication, that Lung Support cures or significantly alleviates certain lung diseases and respiratory problems, reverses existing lung damage in persons with emphysema, prevents breathing problems for otherwise healthy persons, and is clinically proven to eliminate or cure allergies, asthma, colds, and other illnesses and conditions. See Complaint at ¶ 29. The representations made with regards to Lung Support are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 30.

Defendants have represented, either expressly or by implication, that AntiBetic can cure Type I and Type II diabetes, is an effective or superior alternative to insulin or other medications for the treatment of diabetes, and is clinically proven to regenerate or repair the pancreatic beta cells that produce insulin and to lower blood sugar levels in persons with diabetes. See Complaint at ¶ 31. The representations made with regards to AntiBetic are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 32.

Defendants have represented, either expressly or by implication, that G.H.3 is clinically proven to reverse and prevent age-related memory loss, dementia, and Alzheimer's disease, and can increase life spans by 29%. See Complaint at ¶ 33. The representations made with regards to G.H.3 are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 34.

Defendants have represented, either expressly or by implication, that ChitoPlex enables consumers to lose substantial weight without the need for a restricted calorie diet or exercise, reverse obesity, and is proven to cause weight loss based on a 1994 double-blind, placebo-controlled chitosan study conducted in Finland that resulted in chitosan subjects losing an average of 15 pounds in four weeks while consuming their normal diet. See Complaint at ¶ 35. The representations made with regards to ChitoPlex are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 36.

The Defendants have represented, either expressly or by implication, that Testerex is effective in treating impotence or erectile dysfunction in 62-95% of users, and is safe with no harmful side effects. See Complaint at ¶ 37. The representations made with regards to Testerex are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 34.

Through the use of the statements contained in advertisements, Defendants have represented, directly or by implication that all Gero Vita products

have been scientifically tested and proven to be effective, when in truth and in fact, they have not been. See Complaint at ¶¶ 39-40. Therefore, the making of these representations constitutes a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Id. at ¶ 40.

Defendants have represented, expressly or by implications, that the *New Life Nutrition* magazine is an independent publication and not paid commercial advertising, when in truth and in fact, the *New Life Nutrition* magazine is not an independent publication, and is paid commercial advertising written and disseminated by Defendants for the purpose of selling their products. See Complaint at ¶¶ 41-42. Therefore, the making of these representations constitutes a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Id. at ¶ 42.

Defendants have represented, expressly or by implication, that the Council on Natural Nutrition is an independent organization that has expertise in the examination and evaluation of nutritional health products, and that the Council conferred its exclusive Golden Nutrition Award on three of Defendants' products, including G.H.3, and ChitoPlex, based upon its senior scientific editors' independent, objective, and valid examination and evaluation of thousands of nutritional health products, using procedures generally accepted by experts in the relevant fields to yield accurate and reliable results. See Complaint at ¶ 43.

In truth and in fact, the Council on Natural Nutrition is not an independent organization that has expertise in the examination or evaluation of nutritional health products, and it did not confer its exclusive Golden Nutrition Award on the Defendants' products, including G.H.3, and ChitoPlex, based upon

its senior scientific editors' independent, objective, and valid examination and evaluation of thousands of nutritional health products, using procedures generally accepted by experts in the relevant fields to yield accurate and reliable results. See Complaint at ¶ 44. The Council on Natural Nutrition was established by Defendants and has been used by Defendants for the purpose of selling their products. Id.

In addition, the Council on Natural Nutrition does not have a staff of "senior scientific editors" with expertise in evaluating health-related products, and at least one of the "senior scientific editors" is or was an employee of Defendants with no scientific training in the examination or evaluation of nutritional health products. Id. The making of these representations constitutes a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Id.

Defendants have represented, expressly or by implication, that Dr. Ronald Lawrence, Director of the Council on Natural Nutrition, has endorsed Defendants' products, including G.H 3 and ChitoPlex, based upon his independent, objective evaluation of the products. See Complaint at ¶ 45. Defendants have failed to disclose that Dr. Lawrence and the Council on Natural Nutrition have material connections to Defendants. Id. Among other things, Dr. Lawrence is a paid endorser of Defendants' products and is or was a member of Defendant G.B. Data Systems' Board of Directors. Id.

The Council on Natural Nutrition is or was an organization established by Defendants and is or was used for the purpose of advertising and promoting their products. Id. Therefore, the failure to disclose these facts, in light of the representations made, constitutes a deceptive practice, and the making of

false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Id.

Consumers throughout the United States have suffered and continue to suffer substantial monetary loss as a result of the Defendants' unlawful acts or practices. See Complaint at ¶ 46. In addition, Defendants have been unjustly enriched as a result of their unlawful practices. Id. Absent relief, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest. Id.

B. Procedural Summary

On May 27, 2003, the Commission filed its Complaint for Permanent Injunction and Other Equitable Relief in the United States District Court for the Central District of California against Defendants.[1]

On May 28, 2003, the Commission filed Pro Hac Vice applications on behalf of Theodore H. Hoppock, Jill F. Dash, Mamie Kresses, David P. Frankel, and Rosemary Rosso.

On June 17, 2003, the Commission and Defendant Tepper[2] filed a Stipulation to Extend Time to Respond to Complaint.

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[1] The named Defendants in the Complaint include A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., Gero Vita International, Inc., Theraceuticals, Inc., and Ron Tepper.

[2] The stipulation was by and between Plaintiff Federal Trade Commission and Ron Tepper. The parties stipulated that the time in which Defendant Tepper could respond to the Complaint was extended for 27 days.

On July 14, 2003, Defendant Braswell[3] filed a Motion to Stay Proceeding Pending Resolution of Criminal Charges and a Memorandum of Points and Authorities in support thereof.

On July 14, 2003, Defendant Tepper filed a Motion to Dismiss Complaint.

On July 16, 2003, the Commission and Defendants filed a Joint Stipulation to Extend Time to File Answer and to File Rule 16(b) Scheduling Order.

On July 17, 2003, Defendants filed an Amended Motion to Stay Proceedings Pending Resolution of Criminal Charges and a Memorandum of Points and Authorities in support thereof.

August 4, 2003, Defendant Tepper filed a Joinder in Defendants' Motion to Stay Proceeding Pending Resolution of Criminal Charges.

On August 25, 2003, Defendants filed Pro Hac Vice applications on behalf of Christopher R. Cooper and Randall J. Turk.

On September 11, 2003, Defendant Braswell, JOL, G.B. Data Systems, GVI and Theraceuticals filed a Joinder in Defendant Tepper's Motion to Dismiss Complaint.

On September 15, 2003, a Non-Resident Attorney Application was filed by Mark Stancil on behalf of A. Glenn Braswell.

On September 15, 2003, this Court entered an Order Denying Defendant A. Glenn Braswell's Motion to Stay Proceeding Pending Resolution of Criminal Charges.

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[3] The Motion notes: "This motion is being filed on behalf of Mr. Braswell only. Were the motion to be granted, however, it would make little sense to have the case proceed solely against the corporate defendants. The corporate defendants therefore join this motion."

On September 15, 2003, this Court entered an Order Denying Defendant Ron Tepper's Motion to Dismiss Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(6), 9(b) & 9(f).

On September 25, 2003, Defendant Tepper filed an Answer to Complaint and Affirmative Defenses. In the Answer, Defendant Tepper made a Demand for Trial by Jury.

On September 26, 2003, Defendant A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., and Theraceuticals, Inc. filed an Answer and Affirmative Defenses Memorandum.

On October 3, 2003, this Court filed an Order Setting Scheduling Conference for December 1, 2003.

On October 17, 2003, Plaintiff filed a Motion to Strike Various Affirmative Defenses of Defendants A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., Theraceuticals, Inc., and Ron Tepper ("Motion to Strike"), which is before this Court.[4]

II. Discussion

A. Standard

Federal Rule of Civil Procedure 12(f) provides that "[u]pon motion made by a party . . . the court may order stricken from any pleading any insufficient defense, or any redundant . . . matter." (FED.R.CIV.P. 12(f)). A Rule

[4] The FTC's Motion to Strike requests that this Court strike eight affirmative defenses plus two additional statements raised in the Answer filed by A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., Gero Vita International, Inc. and Theraceuticals, Inc. In addition, in the same Motion to Strike, the FTC requests that this Court strike nine affirmative defenses plus two additional statements raised in Defendant Ron Tepper's Answer. (See Motion to Strike at 1.)

12(f) motion to strike is "proper when a defense is insufficient as a matter of law." (See FTC v. Medicor, LLC, 2001 WL 765628, *1 (C.D.Cal.) (citing Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* ¶ 9:378 (2001)). It is the moving party's burden to establish the following: (1) the absence of questions of fact; (2) that any questions of law are beyond dispute; (3) that there is no set of circumstances under which the challenged defense could succeed; and (4) presentation of the defense would prejudice the moving party. (See Schwarzer, at ¶¶ 9:381, 9:375, 9:407.) Thus, a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined by a hearing on the merits. (See Medicor, 2001 WL 765628 at *1 (citing 5A C. Wright & A. Miller, Federal Practice and Procedure (2d ed. 1990) § 1381 at 678)). The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . ." Id. (citing Sidney-Vinstein v. A.H. Robins Co, 697 F.2d 880, 885 (9th Cir. 1983).

B. Analysis

The FTC seeks to strike eight of ten affirmative defenses asserted by Defendants. (See Answer and Affirmative Defenses of Defendant A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., and Theraceuticals, Inc. ("Answer") at 13-14). This Court addresses each of these below. At the outset, though, this Court notes the high threshold involved in striking an affirmative defense. (See Standard, supra.) To a large extent, in seeking to strike certain affirmative defenses, the FTC is asking this Court to determine factual issues and the merits of the defenses and/or claims asserted. However, at this juncture of the litigation, this Court cannot do so. Nonetheless, it should also be noted that while

this Court may not strike the defense at this time, Defendants will still be required to ultimately prove the merits of the defense.

SCANNED

1. This Court Denies the FTC's Motion to Strike Defendants' First Affirmative Defense of Good Faith to the Extent it is Asserted Against the Granting of a Permanent Injunction

The FTC argues that Defendants' affirmative defense of good faith must be stricken because "the law is well-established that good faith is not a defense to the FTC Act." (See Motion to Strike at 4.) This Court agrees that good faith may not be offered as an affirmative defense to a violation of section 5 of the FTC Act. However, to the extent that the affirmative defense is asserted *against the granting of a permanent injunction*, it is permitted.

A careful reading of the case law makes it clear that while good faith is not relevant to whether the actual violation of section 5 of the FTC Act occurred, it *is* relevant to the issue of whether a permanent injunction is appropriate. (See Medicor, 2001 WL 765628 at **2-3; Hang-Ups, 1995 WL 914179 at *3). This is because the granting of a permanent injunction requires that "there exist some cognizable danger of recurrent violation." (See Hang-Ups, 1995 WL 914179 at *3 (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). The determination of whether the alleged violations are likely to recur, requires the court to look at: (1) the deliberateness . . . of the present violation, and (2) the violator's past record." (See id. (citing Sears, Roebuck & Co. v. FTC, Id.676 F.2d 385, 392 (9th Cir. 1982)). As the court in Hang-Ups noted, "good faith on the part of the defendant[s] could be determinative of the first factor and therefore preclude injunctive relief." (See Hang-Ups, 1995 WL 914179 at *3.)

Since the FTC is seeking a permanent injunction against Defendants (see Complaint at 1-2), the issue of whether the wrongful acts were "deliberate" is indeed relevant to the issue of whether a permanent injunction is appropriate. (See Complaint at 1-2.) This Court declines the FTC's invitation to ignore the Medicor and Hang-Ups decision and denies the FTC's Motion to Strike Corporate Defendants' good faith affirmative defense *to the extent it is asserted against the granting of a permanent injunction.*[5]

2. This Court Denies the FTC's Motion to Strike Defendants' Second Affirmative Defense of Laches.

The FTC moves to strike Defendants' laches affirmative defense because "it is well established that laches is not a defense to a civil suit to enforce a public right or to protect a public interest." (See Motion to Strike at 4.) In response, Defendants argue that the law is, in fact, not well-settled, and that the laches defense requires a factual determination making it inappropriate to strike it at this juncture. (See Opposition at 8-9.)

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[5] The FTC cites numerous cases that purportedly support the proposition that good faith is not a defense to violations of section 5 of the FTC Act. However, the FTC's argument is not wholly persuasive for several reasons. First, while the FTC gives great weight to decisions from several other jurisdictions, it gives short shrift to two cases within this jurisdiction that expressly upheld the assertion of a good faith defense against an FTC complaint seeking permanent injunctive relief and individual liability (i.e. the Medicor and Hang-Ups decisions). Second, although the FTC suggests otherwise, the ultimate outcome of the Medicore case is irrelevant to whether the affirmative defense is sufficient to survive a motion to strike. Third, in support of its position, the FTC cites Hang-Ups; however, as both parties noted in their Oppositions, it is clear that the quotation used was taken *completely out of context.*

Traditionally, the doctrine of laches has not been available against the government in a suit by it to enforce a public right or protect a public interest. (See Hang-Ups 1995 WL 914179 at *4 (quoting United States v. Ruby Co., 588 F.2d 697, 705 n.10 (9th Cir. 1978)). However, laches "may be a defense against the government if 'affirmative misconduct' by the government is shown." (Id. (quoting Ruby, 588 F.2d at 705 n.10)). The applicability of laches against the government is determined on a case-by-case basis. (See Hang-Ups, 1995 WL 914179 at *4 (noting that "[t]he facts of the case should decide whether there has been affirmative misconduct by the government such that laches might apply"); Occidental Life Ins. Co. of California v. E.E.O.C., 432 U.S. 355, 373 (1977) (determined on a case-by-case basis)).

Based on the above, the granting of the FTC's Motion to Strike this affirmative defense under Fed.R.Civ.P. 12(f) is improper because (1) it is not beyond dispute whether the laches defense is applicable; (2) there would be a set of circumstances under which the laches defense could succeed; and (3) even if the laches defense does apply, a potential question of fact regarding the presence of "affirmative misconduct" by the government exists. In addition, while the FTC argues that Defendants have conceded that they do not intend to allege bad faith or improper purpose and that Defendants' assertion that affirmative misconduct may be present is "nothing but bare bones conclusory allegations," Defendants vigorously reject this assertion, and note that the FTC's suggestion that Defendants have conceded the absence of affirmative misconduct in prior pleadings is "absurd." (See Opposition at 9.) This further supports this Court's decision not to strike Defendants' affirmative defense of laches at this time.

3. This Court Grants the FTC's Motion to Strike Defendants' Third Affirmative Defense of Failure to Exhaust Administrative Remedies

The FTC argues that Defendants' third affirmative defense, failure to exhaust administrative remedies, must be stricken for several reasons. First, "[t]he plain reading of 13(b) of the FTC Act . . . makes clear that the Commission is not required to pursue its case administratively prior to invoking this Court's jurisdiction." (See Motion to Strike at 5.) Second, the FTC argues that the FTC's authority to bring Section 13 (b) actions directly in federal court has been examined and upheld by numerous courts. (Id.)

The right to bring Section 13(b) actions directly in federal court has indeed been examined and upheld by numerous district and appellate courts. (See Motion to Strike at 5 (citing United States v. JS & S Group, Inc., 716 F.2d 451 (7th Cir. 1983) (holding that the FTC may seek a permanent injunction in federal court . . . without having first instituted administrative proceedings))). This authority was restated in the Ninth Circuit in FTC v. Pantron I Corp., where the court held that Section 13(b) "gives the federal courts broad authority to fashion appropriate remedies for violations of the [FTC] Act." (See Pantron, 33 F.3d 1312, 1314-15 (9th Cir. 1994)). The language of the FTC Act states: "Whenever the Commission has reason to believe . . . that any person, partnership, or corporation is violating or is about to violate, any provision of law enforced by the Federal Trade Commission . . . the Commission may . . . bring suit in a district court of the United States to enjoin any such act or practice. (See 15 U.S.C. § 53(b)(1) (2003)).

Contrary to Defendants' argument, there is no requirement in either Section 13(b) or Section 53(b) that administrative remedies be exhausted before

the FTC is authorized to bring suit in a district court of the United States. Further, the lack of any case law to the contrary leads this Court to grant the FTC's Motion to Strike Defendants' affirmative defense of failure to exhaust administrative remedies.

4. This Court Grants the FTC's Motion to Strike Defendants' Fourth Affirmative Defense of Statute of Limitations

Defendants argue that the FTC's claims under Section 13(b) are subject to the three-year statute of limitations present in Section 19 of the FTC Act. (See Opposition at 10-11.) The gist of Defendants' argument is that since ancillary relief in the form of consumer relief is available under Section 13(b), claims under Section 13(b) must at least comply with the consumer relief provisions of Section 19, including the three-year statute of limitations. (See Opposition at 13-14.) In contrast, the FTC contends that, in addition to case law, the clear language of Section 19 precludes the application of the three-year statute of limitations to actions brought under Section 13(b). (See Motion to Strike at 7.)

Under Section 13(b), ancillary equitable relief, including rescission of contracts and monetary relief in the form of consumer redress and disgorgement for violations of the FTC Act is authorized. (See e.g., Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994); FTC v. Silueta Dist., Inc., 1995 WL 215313, *7 (N.D. Cal. 1995) (noting that the Ninth Circuit's interpretation of Section 13(b) allows federal courts to broadly apply their equitable powers)). Although Section 13(b) does not explicitly state or refer to any statute of limitations (see Motion to Strike at 7), several courts have held that "the three-year statute of limitations contained in Section 19 of the FTC Act is *not* applicable to Section 13(b) cases." (See FTC Minuteman Press, 53 F.Supp.2d 248 (E.D.N.Y. 1998); United States v. Building

Inspector of America, Inc., 894 F. Supp. 507, 514 (D. Mass. 1995)).[6] Section 19 provides in relevant part: "Remedies in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. *Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.*"

Based on the absence of language in Section 13(b) indicating the presence of a statute of limitations and the clear language in Section 19, this Court finds that the FTC's Motion to Strike Defendants' statute of limitations affirmative defense should be granted.

5. This Court Denies the FTC's Motion to Strike Defendants' Fifth Affirmative Defense of Offset/Setoff

In seeking to strike the affirmative defense of offset/setoff, the FTC argues that the appropriate measure of equitable monetary relief pursuant to Section 13(b) of the FTC Act is the full amount lost by consumers without regard to Defendants' profits and with a deduction only for refunds already made. (See Motion to Strike at 8 (citing FTC v. Febre, 128 F.3d 530, 536 (7th Cir. 1997)). Defendants respond that "the FTC's objections to offset of monetary relief are premature and unsupported." (See Opposition at 15.) Moreover, Defendants argue that the determination of whether benefits received by consumers can be considered in determining relief is a factual matter. (Id. at 18.)

Based on the numerous cases cited by both parties in support of their respective positions, this Court finds that a determination as to the applicability of

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[6] As the FTC notes in its Reply, "the Commission determined to pursue this case in federal court, pursuant to 13(b) *rather than through . . . Section 19(a)(2) . . . a decision . . . within its sound discretion.*" (See Reply at 5 n.4.)

this affirmative defense at this time is premature. In other words, the law that an offset/setoff is not allowed is not "beyond dispute." In fact, while the FTC argues that *no* deductions are proper, the FTC's own case law demonstrates that the types of "offset/setoff" sought by Defendants are frequently deducted from overall judgments. For example, in Medicor,[7] the court affirmed the $16.6 million disgorgement judgment only after noting that the FTC "presented the declaration of an accountant indicating that *refunds, charge backs, and returns have been deducted*. (See Medicor, 217 F.Supp.2d at 1057-58 (emphasis added)). In FTC v. Amy Travel Serv. Inc.,[8] the court actually affirmed a reduction for consumers who received a benefit. (See Amy, 875 F.2d 564, 572 (7th Cir. 1989) (noting that "the magistrate correctly acknowledged the existence of satisfied customers in computing the amount of defendants' liability--customers who actually took vacation trips were excluded when the magistrate computed the amount of restitution awarded")). Finally, in FTC v. SlimAmerica, Inc., the court affirmed an $8.4 million redress judgment and stated, "[t]he appropriate measure for redress is [the] aggregate amount paid by consumers, less *refunds* made by defendants." (See SlimAmerica, 77 F.Supp.2d 1263, 1275-76 (S.D. Fla. 1999)).

Based on the above, it is clear that at least some types of deductions Defendants request have been permitted. This is not to say that this Court will allow them here. Rather, this Court must assess this issue in light of the particular facts of this case as compared to the facts of these other cases. Thus, this Court denies the FTC's Motion to Dismiss Defendants' offset/setoff affirmative defense.

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[7] See Motion to Strike at 9.

[8] See FTC's Motion to Strike at 9.

6. This Court Grants the FTC's Motion to Strike Defendants' Sixth Affirmative Defense of First Amendment Violation

Defendants incorporate the arguments explained in Defendant Tepper's Motion to Dismiss the Complaint and further assert that the FTC's theory "that a statement is false or misleading simply because the speaker lacked substantiation at the time the statement was made is unconstitutional." (See Opposition at 20.) In response, the FTC argues that this affirmative defense must be stricken. This Court agrees with the FTC.

First, this Court has already ruled that "the mere initiation of this lawsuit does not restrict in any way the [Defendant's] ability to engage in truthful, non-misleading speech . . . At this time, this Court finds that the Commission's allegations, if proven, will establish that Defendants have engaged in commercial speech that is either false or misleading, neither of which would result in the infringement of [Defendants'] First Amendment right of freedom of speech." (See Motion to Strike at 10 (citing Order Denying Defendant Ron Tepper's Motion to Dismiss Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 9(b) & 9(f) at 19 (Sept. 15, 2003))). As such, This Court finds that Defendants' affirmative defense must be stricken because the issue has already been decided by this Court. (See FED.R.CIV.P. 12(f) (noting that "upon motion made by a party . . . the court may order stricken from any pleading any insufficient defense, or any redundant . . . matter")).

Further, as the FTC argues, the FTC's advertising substantiation requirements have been upheld by numerous circuits, including the Ninth Circuit in Sears, Roebuck & Co. v. FTC, where the court rejected Sears' argument that its First Amendment rights had been violated. (See Sears, 676 F.2d 385, 399-400 (9th Cir. 1982)). The court stated: "The Commission may require prior reasonable

substantiation of product performance claims after finding violations of the [FTC] Act, without offending the First Amendment." (Id.) Thus, a violation of the First Amendment does not result from the mere initiation of a lawsuit.

7. This Court Denies the FTC's Motion to Strike Defendants' Seventh Affirmative Defense of Waiver

Defendants assert that assessing the scope of consumer harm is an issue that cannot be addressed until after "the evidence is in." (See Opposition at 22.) In other words, Defendants argue that there is a significant issue of fact that is unresolved at this stage of the pleadings, making it inappropriate to strike Defendants' affirmative defense. In response, the FTC argues that if the FTC is able to prove that "consumers' purchasing decisions were founded, in part, on false, deceptive or unsubstantiated claims, then such claims are clearly actionable under longstanding and well-established precedent, irrespective of whether consumers entered into contracts." (See Motion to Strike at 12.) Again, based on the parties' own contentions, it is clear that the determination before this Court is premature at the pleading stage.

The FTC Act may be violated if a defendant "induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract." (See Resort Rental Car Sys., Inc., 518 F.2d 962, 964 (9th Cir. 1975)). Since the determination of whether a waiver is present hinges on a finding of deception, this question of fact requires this Court to deny the FTC's Motion to Strike Defendants' affirmative defense of waiver.

8. This Court Grants the FTC's Motion to Strike Defendants' Eighth Affirmative Defense That an Adequate Remedy at Law for Consumer Relief Exists

Defendants' eighth affirmative defense is that injunctive relief is not appropriate in this case because there is an adequate remedy at law." (See Opposition at 23.) Defendants argue once more that "consumer relief claims must be pursued under Section 19," and the FTC should not "be encouraged to circumvent the conditions Congress placed upon suits seeking consumer relief in Section 19 of the FTC Act." (See Opposition at 23.)[9] In response, the FTC cites Hang-Ups, where the court found that the "existence of legal remedies for individual consumers under state law does not bar the FTC from seeking equitable relief under the FTC Act; to find otherwise would nullify much of the FTC Act." (See Hang-Ups, 1995 WL 914179 at *4.)

This Court agrees with the rationale in Hang-Ups, and therefore finds that Defendants' affirmative defense of "adequate remedy at law" must be stricken as insufficient.

9. Defendants' Ability to Assert Additional Affirmative Defenses is Governed by FED.R.CIV.P. 15

The FTC seeks to prevent Defendants from asserting additional defenses in violation of Federal Rule of Civil Procedure 12(b). (See Motion to Strike at 17.) Specifically, it takes issue with Defendants' statement in their Answer that they "reserve the right to *assert additional affirmative defenses* that

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[9] Again, this Court notes that restrictions placed on Section 19 are not relevant as the FTC has chosen to pursue this cause of action under Section 13(b) of the FTC Act.

become apparent during discovery." (See Answer at 14 (emphasis added)). This Court agrees with the FTC that Defendants' right, if any, to assert additional affirmative defenses is governed by Fed. R. Civ. P. 15 and an appropriate request to seek leave to amend the Answer to do so.

10. To the Extent that the Relief Sought by the FTC is Limited to a Permanent Injunction and Other Ancillary Relief Under Section 13(b), Defendants' Request for a Jury Trial is Denied

Defendants argue that they are entitled to a trial by jury because the relief sought by the FTC is "so significant that it cannot fairly be said [to be] a request for prospective injunctive relief." (See Opposition at 25.) In response, the FTC contends that Defendants have no right to a jury trial under Section 13(b) because the relief sought is limited to "a permanent injunction and other equitable ancillary relief derived from the Court's authority to issue such a permanent injunction, pursuant to Section 13(b) of the FTC Act." (See Motion to Strike at 18 (citing FTC v. H.N. Singer, Inc., 1982 WL 1907 **38-39 (N.D. Cal. 1982); Hang-Ups, 1995 WL 914179 at *3).

This Court agrees with the FTC that the cases cited by it make clear that there is no right to a trial by jury in an action under Section 13(b) of the FTC Act, where the monetary relief the FTC seeks is not punitive, but rather is ancillary to the requested injunctive relief.[10] To the extent that Defendants believe such monetary relief may become unlimited or punitive in nature, the FTC is bound by its representations that it "would limit its request for monetary relief to the amount paid by consumers, less any refunds," and more importantly, it is bound by the equitable nature of the relief sought.

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[10] This Court also notes that Defendants have cited no case law in support of their argument to the contrary.

III. Conclusion

Based on the foregoing, this Court **Denies** the FTC's Motion to Strike Defendants' **First, Second, Fifth and Seventh** affirmative defenses. This Court **Grants** the FTC's Motion to Strike as to Defendants' **Third, Fourth, Sixth, and Eighth** affirmative defenses. This Court finds that Defendants' ability to assert additional affirmative defenses is governed by FED.R.CIV.P. 15. This Court further finds that, to the extent that the relief sought by the FTC is limited to a permanent injunction and other ancillary relief under Section 13(b), Defendants' request for a jury trial is denied.

IT IS SO ORDERED.

DATED: NOV 10 2003

DICKRAN TEVRIZIAN

Dickran Tevrizian, Judge
United States District Court

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312 North Spring Street
Los Angeles, CA 90012
Voice Phone: (213) 894-5474

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601 W 5th St, 12th Fl,
City/State: Los Angeles, CA 90071-2025
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CERTIFICATE OF SERVICE

I, Marie Carney, a paralegal at The Lustigman Firm, P.C., counsel for the defendant in the within action, do hereby certify that true and correct copies of the following documents:

DEFENDANT'S OPPOSITION TO FTC'S MOTION TO STRIKE AFFIRMATIVE DEFENSES, JURY DEMAND AND NON-EXISTENT MOTION TO DISMISS

AFFIDAVIT OF ANDREW B. LUSTIGMAN

were served by the Electronic Court Filing system (ECF) on the 19th day of June 2008 upon counsel for plaintiff in the within action:

Kerry O'Brien (Cal. Bar No. 149264)
Sarah Schroeder (Cal. Bar No. 221528)
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415)848-5189
Fax: (415)848-5184
E-mail address: kobrien@ftc.gov

Dated June 19, 2008

Marie Carney